CONSEQUENCES OF THE DEFECTIVE EXECUTION OF A POWER AS CONTROLLED BY INTENTION.—Whatever may have been the origin of the rule[1] and however unsound it may be on principle,[2] it is now well settled that the right of creditors of the donee of a power to apply the property as his assets depends upon an execution of the power by him.[3] The question remains, however, as to just what constitutes such an execution. Clearly an unequivocal expression of intention to execute the power in the terms imposed by the settlor is within the meaning of the rule,[4] for in that case there is no possible conflict as to intention between the donor and donee. When, however, the appointor has shown an intention to execute but has violated the terms imposed by the settlor in some particular, equity will give relief if it appears that the complainant has provided meritorious or valuable consideration.[5] Thus equity will aid creditors,[6] near relatives for whom there is an obligation to provide,[7] purchasers[8] and charities,[9] and will compel the one in whom the estate is vested to hold the property to their use, on the theory that it would be unconscientious for him to hold it beneficially as against a purchaser.[10] From the standpoint of the holder of the title, upon whom equity thus operates, this is the only result consistent with equitable principles. His position differs from that of a trustee holding for a volunteer, for whom equity will clearly intervene to perfect the trust.[11] The principle upon which equity then acts is that in no case was he intended to take beneficially, whereas by the very terms of the settlement of the power the remainderman or reversioner takes the property as his own in default of appointment. Thus it would be manifestly contrary to principle to allow a volunteer to prevail.[12] The only remaining difficulty with the theory is that it apparently disregards the intention of the settlor.[13] This, however, is not strictly true, for equity will only lend aid when the defect is a mere formal matter, as distinguished from one of substance,[14] doubtless on the theory that it is unlikely that a person who places the

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[1]8 COLUMBIA LAW REVIEW 652.

[2]11 COLUMBIA LAW REVIEW 663.

[3]Thompson *v.* Towne (1694) 2 Vern. Ch. 319; Holmes *v.* Coghill (1802) 7 Ves. Jr. 499; Beyfus *v.* Lawley L. R. [1903] A. C. 411.

[4]Beyfus *v.* Lawley *supra.*

[5]Farwell, Powers, (2nd ed.) 327; 2 Sugden, Powers, (6th ed.) 110; see Ellis *v.* Nimmo (1835) Ll. & Go. 333.

[6]Wilkes *v.* Holmes (1752) 9 Mod. 485.

[7]Smith *v.* Ashton (1675) 1 Ch. Cas. 263; Clifford *v.* Clifford (1700) 2 Vern. Ch. 379.

[8]American Freehold Land Mortgage Co. *v.* Walker (1887) 31 Fed. 103.

[9]1 Sugden, Powers, (6th ed.) 267.

[10]2 Sugden, Powers, (6th ed.) 97.

[11]Doctor & Student, Dialogue II, ch. 22.

[12]In accord with these principles, an execution will not be supplied at the instance of a creditor when the appointee is a volunteer, Farwell, Powers, (2nd ed.) 339; thus also a purchaser holding under a valid execution will be given precedence over an appointee under a prior but defective execution. Farwell, Powers, (2nd ed.) 340.

[13]Holmes *v.* Coghill *supra.*

[14]Farwell, Powers, (2nd ed.) 330; Justis *v.* English (Va. 1878) 30 Gratt. 565.

complete power of disposition of his property in another's hands could have intended to attach importance to trivial matters. Hence where circumstances exist which indicate an intention on the part of the settlor to make imperative apparently unimportant provisions, equity will refuse relief.[15]

It is thus apparent that in order to take the property out of the influence of the original settlor it is not necessary that an effectual appointment be made and the controlling factor is rather a clear intention on the part of the donee to exercise control over the property. Hence in the case of a lapse, since there is an intention to take control of the subject-matter of the power, this is considered an execution,[16] and the ultimate disposition of the property is no longer a question of intention but of resulting trusts.[17] That the intention of the appointor is the controlling factor in admitting the aid of equity is indicated by its paramount force in a line of decisions typefied by the recent case of *Pine Lumber Co.* v. *Arnold* (Tex. 1911) 139 S. W. 917, which held that a general residuary clause in a will did not operate as an execution of a power, as the testatrix had other property which could pass by the devise. It is of course clear that the primary question here is solely whether an intention to execute the power is shown,[18] and the solution is thus obvious when special circumstances exist which indicate such intention, such as a clear reference in the will to the power or its subject-matter.[19] Where, however, there is nothing to indicate an intention one way or the other, the difficulty is that any result must be highly speculative; for while a determination of the question either way is bound to effectuate intention in some cases it is apparent that it is as likely to defeat it in some others at least. For this reason the rule in England formerly was in accord with the principal case,[20] but was changed by the Statute of Wills,[21] by which a presumption was created of the execution of the power in every case where general words were used. This change had become necessary owing to the unsatisfactory result in most cases under the old rule.[22] The decisions in America are conflicting,[23] and

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[15]Reid *v.* Shergold (1805) 10 Ves. Jr. 370. When the power is statutory, of course, the question of intention cannot be weighed, and all defects must be treated as defects of substance. Bright *v.* Boyd (1841) 1 Story 478.

[16]Goodere *v.* Lloyd (1830) 3 Sim. 538; Brickenden *v.* Williams (1869) L. R. 7 Eq. 310; Wilkinson *v.* Schneider (1870) L. R. 9 Eq. 423; *In re* Van Hagan (1880) L. R. 16 Ch. D. 18; *In re* Marten L. R. [1902] 1 Ch. 314; *cf.* Chamberlain *v.* Hutchinson (1856) 22 Beav. 444.

[17]*In re* Van Hagan *supra; In re* Scott L. R. [1891] 1 Ch. 298.

[18]See Amory *v.* Meredith (Mass. 1863) 7 Allen 397.

[19]Coxen *v.* Rowland L. R. [1894] 1 Ch. 106; Cooper *v.* Haines (1889) 70 Md. 282.

[20]*In re* Huddleston L. R. [1894] 3 Ch. 595.

[21]1 Vict. c. 26, § 27. *In re* Wilkinson (1869) L. R. 4 Ch. A. C. 587; this statute does not apply to special powers, however. *In re* Mills (1886) L. R. 34 Ch. 186. There is similar legislation in New York, see Lockwood *v.* Mildeberger (1899) 159 N. Y. 181, and Maryland, see Cooper *v.* Haines *supra.*

[22]See Amory *v.* Meredith *supra.*

[23]In accord with the principal case, Maryland Benevolent Soc. *v.* Clendinen (1875) 44 Md. 429; Bingham's Appeal (1870) 64 Pa. 345; Bur-

it is submitted that circumstances such as those mentioned do not permit of any general solution in furtherance of intention. Hence technically the only possible result is that reached in the principal case, of placing the burden of showing an intention to execute the power upon the one benefiting thereby, and preserving the distinction between powers and property.[24] It must be admitted, however, that the contrary rule is a more practical one, as it clearly carries out intention in a greater number of cases.

RIGHT OF WAIVER IN CRIMINAL TRIALS AS GOVERNED BY PUBLIC INTEREST.—It is clearly against the interest of the State to lend its governmental powers and agencies to enforce the decision, on the one hand, of any body constituted not by its laws but by the agreement of the parties, or, in criminal cases, by the prisoner and an agent who has no authority to do so. No agreement, accordingly, providing for an extra-legal tribunal whose judgments shall oust the courts of jurisdiction, will be held binding,[1] and on the same principle the cases almost universally agree in refusing to effectuate the waiver of a privilege or right which is considered to go to the jurisdiction of the court.[2] Thus it has been held that the number of jurors at a criminal trial is a matter to be fixed only by organic law, and that the waiver by the accused of a deficiency of a juror will not confer jurisdiction on a court thus illegally constituted, and preclude an attack on its judgment at any time.[3] But even if the privilege or right in question be not jurisdictional, a waiver will not be permitted if believed to be against that further interest, which, as the cases say, the State has in the lives and liberties of its citizens,[4] and it is doubtless this consideration which has given rise to the greater restriction on waivers in criminal than in civil trials, and in felonies than in misdemeanors.[5] It is recognized, however, that many of the privileges guaranteed both in civil and in criminal cases fall into neither of the foregoing classes, but exist for the benefit of the individual alone, and it is everywhere conceded that such rights as these may be waived at will.[6]

It would seem, however, that no generally accepted definition of the term "jurisdiction" has been attained. Contrary to the decisions referred to above,[7] it has been declared that the right to a jury of twelve

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leigh *v.* Clough (1872) 52 N. H. 267; Hollister *v.* Shaw (1878) 46 Conn. 248; Bilderback *v.* Boyce (1880) 14 S. C. 528; Meeker *v.* Breintnall (1884) 38 N. J. Eq. 345; *contra,* Amory *v.* Meredith *supra;* Stone *v.* Forbes (1905) 189 Mass. 163.

[24]See 11 COLUMBIA LAW REVIEW 663.

[1]Insurance Co. *v.* Morse (1874) 87 U. S. 445.

[2]See Cancemi *v.* People (1858) 18 N. Y. 128; B. & O. R. R. Co. *v.* Polly (Va. 1858) 14 Gratt. 447.

[3]See Cancemi *v.* People *supra;* Cooley, Constitutional Limitations, (7th ed.) 459.

[4]Hopt *v.* Utah (1884) 110 U. S. 574.

[5]See 6 Criminal Law Magazine 182 *et seq.*

[6]6 Criminal Law Magazine 183 *et seq.;* Connors *v.* People (1872) 50 N. Y. 240; Joy *v.* State (1860) 14 Ind. 139, 152; U. S. *v.* Sacramento (1875) 2 Mont. 239; State *v.* Hartley (1895) 22 Nev. 342.

[7]See note 3 *supra.*